IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Court, U.S.
FILED
FEB 4 1972
CLERK

No. _____

MYRON EPSTEIN,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK AND APPENDIX

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	15
APPENDIX	1a

TABLE OF CITATIONS

Cases:

Boyd v. United States, 116 U.S. 616 (1886)	9, 11, 14
Clark v. State of Washington, 366 F.2d 678 (C.A. 9, 1966)	10
Cohen v. Hurley, 366 U.S. 117 (1961)	10, 11, 12
Cummings v. Missouri, 4 Wall. 277 (1867)	12
Ex Parte Garland, 4 Wall. 333 (1867)	12
Gardner v. Broderick, 392 U.S. 273 (1968)	13
Garrity v. New Jersey, 385 U.S. 493 (1967)	10
Gately v. Sutton, 310 F.2d 107 (C.A. 10, 1962)	10
In Re Ruffalo, 390 U.S. 544 (1968)	12
Knoll Associates, Inc. v. Federal Trade Commission, 397 F.2d 530 (C.A. 7, 1968)	14
Lees v. United States, 150 U.S. 476 (1893)	11
MacKay v. Nesbett, 285 F. Supp. 498 (D. Alaska, 1968), aff'd. 412 F.2d 846 (C.A. 9, 1969)	10
Matter of Farrell, 27 A.D.2d 61, 276 N.Y.S.2d 61 (1st Dept., 1966)	7, 9
Matter of Klebanoff, 27 A.D.2d 322; 278 N.Y.S.2d 933 (1st Dept., 1966)	7
Matter of Klebanoff, 21 N.Y.2d 920, 289 N.Y.S.2d 755 (1968)	8

Matter of Selig, 32 A.D.2d 213, 302 N.Y.S.2d 941 (1st Dept., 1969) 7, 9

Matter of Ungar, 27 A.D.2d 925, 282 N.Y.S.2d 158 (1st Dept., 1967) 7, 8, 9

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) 11, 14

Raley v. Ohio, 360 U.S. 423 (1959) 2

Rochin v. California, 342 U.S. 165 (1952) 2

Rogers v. Richmond, 365 U.S. 534 (1961) 2

Spevack v. Klein, 385 U.S. 511 (1967) 11, 13, 14

Ullmann v. United States, 350 U.S. 422 (1956) 10

Uniformed Sanitation Men v. Commissioner of Sanitation, 392 U.S. 280 (1968) 13

United States v. Brown, 381 U.S. 437 (1965) 12

United States v. Lovett, 328 U.S. 303 (1946) 12

United States v. U.S. Coin & Currency, 401 U.S. 715 (1971) . . . 9, 11

Zuckerman v. Greason, 20 N.Y.2d 430, 285 N.Y.S.2d (1967) 8, 9

Constitution:

Constitution of the United States:

Amendment IV 3
Amendment V 3
Amendment XIV 3

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THE ASSOCIATION OF THE BAR
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK AND APPENDIX

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered November 4, 1971, suspending petitioner from practice as an attorney and counselor at law in the State of New York for a period of eighteen months.

OPINION BELOW

The opinion of the Appellate Division is reported at 325 N.Y. S.2d 657.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). The order of the Appellate Division was entered on November 4, 1971, and modified on January 6, 1972. On December 2, 1971, the Court of Appeals of the State of New York entered orders dismissing petitioner's appeal taken as of right and denying his motion for leave to appeal.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination, as applied to State action through the Fourteenth Amendment, precludes a State from imposing upon an attorney the penalty of suspension from the practice of law for a period of eighteen months solely on the basis of the attorney's own compelled testimony before a Grand Jury on an express grant of immunity after he invoked the constitutional privilege.

2. Whether the Fourth Amendment, as applied to State action through the Fourteenth Amendment, prohibits the use in disciplinary proceedings of the attorney's testimony before a Grand Jury compelled by a grant of immunity after the attorney had invoked his constitutional privilege against self-incrimination.[1]

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[1] If certiorari is granted petitioner will also urge that the State action of suspension from the practice of law upon the basis of traditionally secret Grand Jury testimony compelled under a State statute granting immunity from prosecution, penalities and forfeitures which was released to the Bar Association upon an *exparte* order constituted a violation of the more generalized fundamental concepts of fairness of the due process clause of the Fourteenth Amendment. Cf. *Rogers v. Richmond*, 365 U.S. 534 (1961); *Raley v. Ohio*, 360 U.S. 423 (1959); *Rochin v. California*, 342 U.S. 165 (1952); *Fay v. Hoia*, 372 U.S. 391 (1963); *Stevens v. Marks*, 383 U.S. 234 (1966).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

United States Constitution, Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself . . .

United States Constitution, Amendment XIV

Section 1 . . . nor shall any State deprive any persons of life, liberty or property without due process of law; . . .

STATEMENT OF THE CASE

Petitioner was admitted to practice as an attorney and counselor at law in the State of New York on October 26, 1949. On April 16, 1970, the Association of the Bar of the City of New York (hereinafter "Bar Association") presented to the Appellate Division of the Supreme Court of the State of New York, First Department, a petition containing charges of professional misconduct against petitioner. On April 30, 1970, the Appellate Division appointed a referee to take testimony with respect to the charges and report to the Court. The referee filed his report sustaining the charges on April 28, 1971. On November 4, 1971, the Appellate Division confirmed the report of the referee and suspended petitioner from practice as attorney and counselor at law in the State of New York for a period of eighteen months, effective December 6, 1971. The effective date of the suspension was later extended for a period of sixty days from December 6, 1971. On December 2, 1971, the Court of Appeals of the State of New York dismissed petitioner's appeal taken as of right and denied his motion for leave to appeal.

The petition filed by the Bar Association alleged that petitioner had participated as intermediary in negotiating for an illegal payment to an employee of the State Liquor Authority in order to obtain a favorable disposition with respect to a former client who was the subject of a State Liquor Authority investigation.

The disciplinary charges were based upon petitioner's testimony in 1969 before a grand jury of the County of New York investigating certain matters involving the New York State Liquor Authority. Upon being called to testify, when asked if he knew an individual named Segal, petitioner stated, "I wish to invoke my constitutional privilege against self-incrimination." He was then informed by the Assistant District Attorney conducting the investigation that the grand jury had voted to grant him immunity from prosecution pursuant to the statutes of the State of New York, that upon answering questions when directed by the foreman of the grand jury "you have full, complete, legal immunity, as full and complete as the law will allow; and that having received immunity you must then answer each and every proper question put to you this afternoon." The pertinent New York statute grants immunity from prosecution and from being subject to any "penalty or forfeiture" on account of any matter which is the subject of a witness' testimony. Petitioner was directed by the foreman of the grand jury to answer the question posed by the Assistant District Attorney and was thus compelled by the grant of immunity to testify with respect to the transaction which was the basis for his suspension.

Petitioner testified that in 1965 he learned in conversations with Segal that he was having difficulties with the State Liquor Authority concerning possible license revocations, inquired of an old acquaintenance named Muroff whether anything could be done to help Segal, was told that Segal could be helped by a payment of $5,000, communicated this information to Segal with the admonition that he would have nothing to do with the transaction, and

later advised Muroff that Segal wanted to go ahead. Petitioner further testified that he was later informed by Muroff that the payment required was $25,000, that he communicated this information to Segal and advised him against making any payment, that no payment was ever made, and that that ended the matter.

On June 16, 1969, on the exparte affidavit of the Assistant District Attorney who conducted the investigation, without notice to petitioner, the grand jury minutes containing petitioner's testimony, which are traditionally secret, were authorized by a Justice of the Supreme Court of the State of New York to be released to the New York State Liquor Authority and to the Committee on Grievances of the Bar Association. Thereafter disciplinary proceedings were instituted against petitioner by the Bar Association charging that, having been advised that a former client was the subject of a State Liquor Authority investigation, petitioner "participated as intermediary in negotiating for an illegal payment to an employee of the State Liquor Authority assigned to the investigation in order to obtain a favorable disposition of the matter" for his former client. Petitioner's answer to the charges alleged that all the evidence obtained and used against him in the disciplinary proceeding was obtained and used in violation of his "constitutional rights under and pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution * * * and by reason of respondent (petitioner) heretofore having received immunity, the within proceedings are without warrant in law." On April 30, 1970, the Appellate Division appointed a referee to take testimony and report his opinion thereon.

At the hearing before the referee the Bar Association offered in evidence petitioner's testimony before the grand jury. Petitioner objected to its introduction on the ground that it had been compelled under a grant of immunity and that the use of it in the disciplinary proceeding violated his rights under the Fifth Amendment and the New York

immunity statute (Section 619(c), Subdivision 2 of the Code of Criminal Procedure) which provides that a person compelled to testimony under a grant of immunity "shall not be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which" he was compelled to testify. A further ground of objection was that the Bar Association had obtained the grand jury testimony as the result of an *exparte* order with respect to which petitioner had no notice and no opportunity to be heard. The referee overruled the objections and admitted the grand jury minutes on the ground that the immunity granted did not extend to disciplinary proceedings. The Bar Association offered no further evidence with respect to the charges.

The referee's report, dated February 25, 1971, recites that as an affirmative defense respondent (petitioner) alleged that all the evidence obtained by the Bar Association and used against him in the disciplinary proceeding was obtained and used in violation of his constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and that the disciplinary proceedings were without warrant in law by reason of the grant of immunity. The report further recites that the Bar Association rested after the admission into evidence of a transcript of the grand jury testimony and adduced no other evidence.

Placing principal reliance upon the grand jury testimony, the referee found the charges sustained. Referring to the numerous character witnesses who testified in petitioner's behalf, which the referee stated "may be considered in mitigation", he singled out the testimony of one witness as "impressive and moving". The referee found with respect to petitioner's constitutional claims that they "cannot be held to preclude the use of the testimony before the grand jury, nor to immunize the respondent (petitioner) against the prosecution of these disciplinary proceedings." The report recited that "In mitigation, there may be considered

respondent's (petitioner's) twenty-two years of unblemished practice as a lawyer; the high esteem and confidence expressed by fellow attorneys as well as clients" and that "All the evidence relates to a single attempted transaction. It is highly doubtful that respondent (petitioner) will ever engage in another 'deal' of this type."

The referee's report was filed in the Appellate Division on April 28, 1971, and the Bar Association moved on September 15, 1971, for an order confirming the referee's report and adjudging petitioner guilty of professional misconduct.

On the motion to confirm petitioner expressly preserved his constitutional claims. On November 4, 1971, the Appellate Division ordered the referee's report confirmed and suspended petitioner from practice as an attorney and counselor at law for a period of eighteen months, effective December 6, 1971, and until the further order of the Court. By order dated January 6, 1972, the effective date of the suspension order was extended for a period of 60 days from December 6, 1971. The Court's opinion expressly sets forth petitioner's claim "that the prosecution of this disciplinary proceeding was without warrant in law due to the immunity which had been conferred on him when he testified on the subject matter of the charge, before a Grand Jury of the County of New York, and further that the evidence obtained and used against him was obtained and used in violation of respondent's (petitioner's) rights under the Constitutions of both the United States and of the State of New York" and rejects it, citing *Matter of Ungar*, 27 A.D.2d 925, 282 N.Y.S.2d 158 (1st Dept., 1967); *Matter of Farrell*, 27 A.D.2d 61, 276 N.Y. S.2d 61 (1st Dept., 1966); *Matter of Klebanoff*, 27 A.D.2d 322, 278 N.Y. S.2d 933 (1st Dept., 1966); and *Matter of Selig*, 32 A.D.2d 213, 302 N.Y. S.2d 94 (1st Dept., 1969). The pertinent holding of the cited cases is that the privilege against self-incrimination does not preclude

the use in disciplinary proceedings of testimony compelled by a grant of immunity or other coercion. The Court further stated that in imposing the suspension for eighteen months it considered as mitigating circumstances the fact that "it appears that all of the evidence relates to a single attempted transaction and it should not be assumed that respondent (petitioner) will ever engage in another 'deal' of this type. We have also considered respondent's (petitioner's) twenty-two years of unblemished practice as a lawyer; the fact that he is a family man with two teenage daughters; that it appears he has been held in high esteem and confidence by fellow attorneys, as well as clients."

Petitioner filed a notice of appeal as of right and motion for leave to appeal in the Court of Appeals of the State of New York relying upon the same claims under the United States Constitution as he asserted in the disciplinary proceeding before the referee and the Appellate Division. On December 2, 1971, the Court of Appeals granted a motion to dismiss the appeal upon the ground that no substantial constitutional question is directly involved and denied petitioner's motion for leave to appeal.

REASONS FOR GRANTING THE WRIT

1. In a number of recent cases the courts of the State of New York have denied claims asserted under the United States Constitution and held that the Fifth Amendment privilege against self-incrimination does not apply to the punishment of an attorney by suspension or disbarment because "disciplinary proceedings for professional misconduct are civil in nature" whereas "the Fifth Amendment relates to self-incrimination on charges of crime." *Zuckerman v. Greason*, 20 N.Y.2d 430, 438, 285 N.Y.S.2d 1, 6 (1967). Chief Judge Fuld dissented, being of the opinion that compelled testimony cannot constitutionally be used in disciplinary proceedings. The Court of Appeals reaffirmed its view in *Matter of Klebanoff*, 21 N.Y.2d 920, 289 N.Y.S.2d 755 (1968), holding that the Fifth Amend-

ment does not preclude the use in disciplinary proceedings of grand jury testimony coerced by a grant of immunity. Chief Judge Fuld felt constrained to concur on the authority of the *Zuckerman* case but stated that he still subscribed to the views expressed in his dissent in that case. The lower Courts have applied the Court of Appeals' distinction between civil and criminal cases in denying the protection of the Fifth Amendment in a host of other disciplinary proceedings. See, e.g., *Matter of Ungar*, 27 A.D.2d 925, 282 N.Y. S.2d 158 (1st Dept., 1967); *Matter of Farrell*, 27 A.D.2d 61, 276 N.Y. S.2d 61 (1st Dept., 1966); *Matter of Selig*, 32 A.D.2d 213, 302 N.Y. S.2d 94 (1st Dept., 1969). The decision of the Court below is a further application of this doctrine.

But this Court last Term in *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971), in accordance with prior decisions of long standing, rejected the dependence of the applicability of the privilege against self-incrimination upon the distinction between civil and criminal proceedings, and held the privilege properly invoked in a forfeiture proceeding denominated civil. The Court reiterated the doctrine enunciated almost a century ago that forfeiture proceedings are criminal in nature although they may be civil in form: "But as *Boyd v. United States*, 116 U.S. 616, 634 (1886), makes clear, 'proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes." 401 U.S. at 418. Where "money liability is predicated upon a finding of the owner's wrongful conduct," whether as a civil forfeiture or a criminal fine, "the Fifth Amendment applies with equal force." *Ibid.*

Forfeiture of the right to practice law, whether temporarily by suspension or permanently by disbarment, seems no less a criminal punishment than forfeiture of one's property or one's money. Obviously, the seriousness of its personal and economic impact on the attorney

involved is much greater. And the fact that suspension, as in the present case, serves the function of punishment alone is made clear by its implicit recognition that the penalized practitioner will be fit to serve as an attorney at law upon the termination of his suspension. The question whether the Fifth Amendment privilege against self-incrimination extends to the penalty of an attorney's suspension from the practice of law thus presents an important question under the Constitution of the United States which has not been and should be decided by this Court.[2]

Upon being compelled to testify before the grand jury by the grant of immunity, after he invoked the Fifth Amendment privilege, petitioner became entitled to immunity from all penalties within the scope of the privilege regardless of the intended reach of the grant. The compulsion of incriminating testimony generates an immunity from sanctions which are "criminal in nature", *Ullmann v. United States*, 350 U.S. 422, 431 (1956), whether or not the immunity is contemplated when the testimony is compelled. *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Ullmann v. United States, supra*, where the constitutionality of an immunity statute was assailed on the ground that the testimony compelled might result in disqualification from federal employment and other disabilities, the Court stated that a witness who is compelled to answer under the protection of immunity "has, of course, when a particular sanction is so

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[2] Unless this Court reviews this question on certiorari, the interpretation under the United States Constitution of the scope of the privilege with respect to disciplinary proceedings will be left to the State courts since the United States Courts of Appeals have uniformly held, because of the immunity of the States from the injunctive processes of the federal courts and from suits by individuals without their consent, that an attorney may not bring an action in a federal district court to challenge the constitutional validity of a suspension or disbarment order. See, e.g., *MacKay v. Nesbett*, 285 F. Supp. 498 (D. Alaska, 1968), aff'd. 412 F. 2d 846 (C.A. 9, 1969); *Clark v. State of Washington*, 366 F.2d 678 (C.A. 9, 1966); *Gately v. Sutton*, 310 F.2d 107 (C.A. 10, 1962).

sought to be imposed against him, the right to claim that it is criminal in nature." 350 U.S. at 431. The use of compelled testimony in the present case, therefore, squarely poses the question whether the punishment of suspension imposed in a disciplinary proceeding is "criminal in nature" within the scope of the Fifth Amendment's prohibition against compelled, self-incriminating testimony.

An attorney's right to assert the privilege in a disciplinary proceeding was upheld in *Spevak v. Klein*, 385 U.S. 511 (1967). The argument that the sanction of suspension from the bar is a sanction criminal in nature for Fifth Amendment purposes finds formidable support not only in the decisions of this Court which held the forfeiture of money or property in civil proceedings within the scope of the self-incrimination privilege [*United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971); *Boyd v. United States*, 116 U.S. 616 (1886); *Lees v. United States*, 150 U.S. 476 (1893); cf. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701 (1965)] but also in the many decisions of this Court holding disqualification from the practice of law and other employments penalties under other constitutional safeguards.

The continued vitality of the *Boyd* case with respect to the applicability of the self-incrimination privilege was underscored not only in *United States v. U.S. Coin & Currency, supra*, but also by the reaffirmation in *Spevak v. Klein*, 385 U.S. 511 (1967), "of the broad protection given the privilege" in *Boyd v. United States, supra*. In *Boyd* "compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself" (385 U.S. at 515). The *Lees* and *Plymouth Sedan* cases also involved property forfeitures. The dissenting opinions in *Cohen v. Hurley*, 366 U.S. 117 (1961), overruled in *Spevak v. Klein, supra*, expounded the views that the effects of disbarment were so severe as to entitle a lawyer to "the full benefit of the 'law of the land'" (366 U.S. at 147) and that "taking away

a man's right to practice law is imposing a penalty as severe as a criminal sanction" (366 U.S. at 153-154).

As noted, denial of the right to engage in the practice of law or in other occupations has been held similar to a criminal penalty for the purpose of other constitutional provisions. An attorney has been held "entitled to procedural due process, which includes fair notice of the charge" in disciplinary proceedings because they "are proceedings of a quasi-criminal nature" and disqualification from practice "is a punishment or penalty imposed on the lawyer". *In Re Buffalo*, 390 U.S. 544 (1968). Disqualification from the practice of law, as well as the pursuit of other vocations, has been regarded as punishment for purposes of the Constitution's bill of attainder and *ex post facto* prohibitions. *Ex Parte Garland*, 4 Wall. 333,377 (1867) (legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri*, 4 Wall. 277, 327 (1867) ("this deprivation [of right to pursue regular avocations] is punishment"); *United States v. Lovett*, 328 U.S. 303, 316 (1946) ("permanent proscription from any opportunity to serve the Government is punishment"); *United States v. Brown*, 381 U.S. 437 (1965) (disqualification from holding union office held punishment). No reason is readily apparent why disqualification from practicing law, which has been regarded as a criminal penalty for the purpose of other constitutional safeguards, should not similarly be regarded as criminal punishment for purposes of the privilege against self-incrimination. The question whether disciplinary action against attorneys is within the protection of the privilege, therefore, warrants review by this Court.

The importance of an authoritative determination by this Court whether a disciplinary proceeding is a criminal case for purposes of the Fifth Amendment privilege is accentuated by the divergent nondecisional views expressed by members of this Court. The affirmative opinions of Justices Black and Douglas in dissent in *Cohen v. Hurley*,

supra, overruled in *Spevak v. Klein, supra*, have already been noted. A contrary view, however, has been indicated by Mr. Justice Harlan in *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280 (1968) and *Gardner v. Broderick*, 392 U.S. 273 (1968). The opinion of the Court by Mr. Justice Fortas in the *Gardner* case (p. 278) acknowledged that a policeman, immune from criminal prosecution, might be required "to answer questions specifically, directly, and narrowly relating to the performance of his official duties". In a concurring opinion, joined by Mr. Justice Stewart, Mr. Justice Harlan finds in the *Gardner* and *Uniformed Sanitation* cases "a procedural formula whereby" lawyers may be "disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices" (392 U.S. at 285). Obviously, if a lawyer may be punished for refusing to disclose information that may lead to disciplinary action, notwithstanding the holding of *Spevak v. Klein, supra*, that he may not be disbarred for invoking the Fifth Amendment privilege, disciplinary proceedings are not within the protection of the privilege. Mr. Justice Fortas, however, expressly differentiated the situation of a public official from that of a lawyer, thereby suggesting that, even absent the possibility of criminal prosecution, the lawyer may not be disciplined for refusing to provide information concerning his law practice presumably because disciplinary proceedings are within the scope of the privilege.

In light of the numerous decisions of the Court holding civil forfeitures protected by the privilege, the variety of the Court's decisions holding disbarment and disqualification from employment to be punishment under other constitutional safeguards, the many State court decisions denying the applicability of the privilege to disciplinary proceedings, and the divergent views expressed at different times by members of this Court, the desirability of a dispositive decision by this Court on this important and frequently recurring constitutional question whether the Fifth Amend-

ment privilege against self-incrimination applies to the penalty of disqualification from the practice of law seems apparent.

2. The compulsory production of petitioner's testimony before a grand jury by a grant of immunity and the *ex parte* release of this testimony to the Bar Association for use in disciplinary proceedings also amounted to an unreasonable search and seizure in violation of the Fourth Amendment.

Spevak v. Klein, supra, decided that a lawyer cannot be disbarred because of his refusal to testify at a disciplinary investigation in reliance on the privilege against self-incrimination. Petitioner, however, under threat of contempt, was compelled to forego the privilege and supply inculpatory information. The fruits of this compulsion were the basis for his suspension. *Boyd v. United States, supra*, held that "a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment" (116 U.S. at 622). Coerced production of evidence to forfeit an attorney's right to practice law would appear to be comparable in penal effect to forfeiture of property. The policy of the exclusionary rule to discourage violation of the constitution protection would seem to preclude the use of evidence obtained in violation of the Fourth Amendment in a civil, as well as a criminal, proceeding. Evidence tainted by an unreasonable search has been held inadmissible in an administrative proceeding which resulted in a cease and desist order. *Knoll Associates, Inc. v. Federal Trade Commission*, 397 F.2d 530 (C.A. 7, 1968). The same policy should preclude use in disciplinary proceedings of the product of the constitutional invasion to the detriment of the person whose constitutional privilege was violated. The present case thus presents a question of important constitutional dimensions under the Fourth, as well as the Fifth, Amendment. *One 1958 Plymouth Sedan v. Pennsylvania, supra.*

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF APPELLATE DIVISION, November 4, 1971

PER CURIAM:

Respondent, in this proceeding pursuant to Section 90 of the Judiciary Law, is before the Court following hearings on a charge before a Referee. He was admitted to the Bar in the Second Judicial Department on October 26, 1949.

He has admitted in substance that in or about June, 1965 he participated as an intermediary in negotiating an unlawful payment to an employee of the State Liquor Authority in order to obtain a favorable disposition of a then pending investigation of one of his clients. The Referee has found him guilty of the charge and we confirm the report of the Referee. It is claimed by respondent that the prosecution of this disciplinary proceeding was without warrant in law due to the immunity which had been conferred on him when he testified on the subject matter of the charge, before a Grand Jury of the County of New York, and further that the evidence obtained and used against him was obtained and used in violation of the respondent's rights under the Constitutions of both the United States and of the State of New York. His claim that the prosecution of this disciplinary proceeding was without warrant in law because the only evidence introduced by petitioner in support of the charges was the respondent's testimony before the Grand Jury must be rejected. See *Matter of Ungar*, 27 A.D.2d 925, leave to appeal denied 20 N.Y.2d 642, cert. denied 389 U.S. 1007; *Matter of Farrell*, 27 A.D.2d 61; *Matter of Klebanoff*, 20 A.D.2d 322 and *Matter of Selig*, 32 A.D.2d 213. The challenge made by respondent to the procedure used in obtaining the minutes of respondent's Grand Jury testimony

must be rejected. It was in accord with applicable law. *People v. DiNapoli*, 27 N.Y.2d 229.

There is no doubt as to respondent's culpability. He may have acted, stupidly, as he put it, but he did not act innocently.

The charge, as sustained against the respondent, constitutes serious professional misconduct involving bribery of public officials, and ordinarily would require disbarment of the attorney involved. *Matter of Farrell*, 27 A.D.2d 61; *Matter of Thaler*, 30 A.D.2d 166.

However, in mitigation, it appears that all of the evidence relates to a single attempted transaction and it should not be assumed that respondent will ever engage in another "deal" of this type. We have also considered respondent's 22 years of unblemished practice as a lawyer; the fact that he is a family man with two teen-age daughters; that it appears he has been held in high esteem and confidence by fellow attorneys, as well as clients.

Except for the mitigating circumstances aforesaid, we would disbar the respondent. Under the particular circumstances, however, he should be suspended from practice for a period of 18 months and until further order of this Court.

ALL CONCUR

ORDER OF APPELLATE DIVISION, November 4, 1971

The Association of the Bar of the City of New York, by John G. Bonomi, Esq., its attorney, having presented to this Court on April 16, 1970, a petition containing charges of professional misconduct against the above-named respondent, Myron Epstein, who was admitted to practice as an attorney and counselor-at-law in the State of New York, on October 26, 1949, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorney, David B. Friedland, Esq., and having interposed an answer to said petition, duly verified April 8, 1970, and the Court having duly made and entered an order on April 30, 1970, appointing Hon. Daniel Gutman, as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and a hearing, pursuant to said order of reference having been duly held before the said Referee and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated February 25, 1971, and was filed in the office of the Clerk of this Court on April 28, 1971;

And the petitioner thereafter and on September 15, 1971, having moved for an order confirming the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper;

Now, upon reading the petition of The Association of the Bar of the City of New York, verified February 4, 1970, the affidavit of John G. Bonomi, Esq. annexed thereto, sworn to February 3, 1970, the notice of presentation of said petition, dated February 4, 1970, with

proof of due service thereof upon the respondent, the answer of the respondent to said petition, verfieid April 8, 1970, the order of this Court, dated April 30, 1970, appointing Hon. Daniel Gutman, as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on April 30, 1970, the report of Hon. Daniel Gutman, the Referee herein, dated February 25, 1971, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on April 28, 1971; and upon reading and filing the notice of motion for an order confirming the report of the referee and adjudging the respondent guilty of professional misconduct, dated June 7, 1971, with proof of due service thereof, the memorandum of John G. Bonomi in support of said motion, and the affidavit Myron Epstein, sworn to September 14, 1971, and the memorandum of David B. Friedland in opposition thereto, and after hearing Mr. John G. Bonomi for the motion, and Mr. David B. Friedland opposed, and due deliberation having been had thereon and upon the Per Curiam Opinion of this Court filed herein; and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

Ordered that the report of Hon. Daniel Gutman, the Referee herein, filed in the office of the Clerk of this Court on April 28, 1971, be, and the same hereby is, confirmed; and it is further unanimously

Ordered that said Myron Epstein be, and he hereby is suspended from practice as an attorney and counselor-at-law in the State of New York for a period of eighteen (18) months, effective December 6, 1971, and until the further order of this Court, with leave to apply for reinstatement after the expiration of said period of eighteen (18) months upon furnishing satisfactory proof that during said period he has actually refrained from attempting to practice as an attorney or counselor-at-law and has otherwise properly con-

ducted himself and has fully complied with Title 22, Section 603.14 of the Rules of the Appellate Division, Supreme Court, First Judicial Department, annexed hereto and made a part hereof; and it is further unanimously

Ordered that said Myron Epstein be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, for a period of eighteen (18) months, effective December 6, 1971, and until the further order of this Court; and it is further unanimously

Ordered that said Myron Epstein be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority for a period of eighteen (18) months, effective December 6, 1971, and until the further order of this Court; and it is further unanimously

Ordered that said Myron Epstein be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, for a period of eighteen (18) months, effective December 6, 1971, and until the further order of this Court.

ORDER OF APPELLATE DIVISION.
January 6, 1972

An order of this Court having been made and entered herein on November 4, 1971, suspending the above-named respondent, Myron Epstein, from practice as an attorney and counselor-at-law for a period of eighteen (18) months, effective December 6, 1971,

And said respondent having moved for an order extending the effective date of respondent's suspension from December 6, 1971 to May 6, 1972,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Myron Epstein in support of said motion, and the affidavit of Patrick J. Moynihan in opposition thereto, and after hearing Mr. Sanders I. Epstein for the motion, and Mr. Patrick J. Moynihan opposed,

It is ordered that said motion be and the same hereby is granted only to the extent of extending the effective date of the order of suspension for a period of sixty (60) days from December 6, 1971.

ORDER OF COURT OF APPEALS
December 2, 1971

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken as of right by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

ORDER OF COURT OF APPEALS
December 2, 1971

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

EXCERPTS FROM REFEREE'S REPORT, February 25, 1971

* * * * *

3. As an affirmative defense, respondent alleged that all of the evidence obtained by the petitioner and used against the respondent in this proceeding, was obtained and used in violation of respondent's constitutional rights under and pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

* * * * *

5. At the hearing of these charges, respondent, pursuant to a notice of amendment, moved to amend the first affirmative defense in his answer to allege in addition that "by reason of respondent heretofore having received immunity, the within proceedings are without warrant in law." The motion to amend was granted over objection by the attorney for the petitioner.

The Evidence

Counsel for the petitioner rested after the admission into evidence of a transcript of grand jury testimony. (Petitioner's Exhibit 1) No other evidence was adduced by the petitioner. (22) This was preceded by an extended discussion of objections raised by respondent's attorney who argued that the minutes of the Grand Jury were obtained as a result of an ex parte order that was granted on application of the District Attorney of New York County (5; Respondent's Exhibit A) that respondent, on the request of the Assistant District Attorney, was granted "full immunity" by the Grand Jury after he had invoked his privilege against self-incrimination (10); that the matters for which these proceedings were being prosecuted were precisely the matters concerning which respondent testified before the Grand Jury.

* * * * *

... As for the legal arguments directed to the matter of immunity, and to the obtaining of the Grand Jury minutes by ex parte order, it is my opinion that under the circumstances of this case, they are not applicable, and in the absence of binding authority to the contrary cannot be held to preclude the use of the testimony before the Grand Jury, nor to immunize the respondent against the prosecution of these disciplinary proceedings.

In mitigation, there may be considered respondent's twenty-two years of unblemished practice as a lawyer; the high esteem and confidence expressed by fellow attorneys as well as clients, and perhaps most of all that he specialized in a field that was overshadowed by a venal agency where known corrupt practices were as a web of temptation which led to the downfall of other practitioners, eager to obtain satisfactory results in an area where such results could be bought and paid for.

All the evidence relates to a single attempted transaction. It is highly doubtful that respondent will ever engage in another "deal" of this type.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-994

MYRON ERSKINE, an Attorney,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

	PAGE
Preliminary Statement	1
ARGUMENT:	
The immunity afforded petitioner was co-extensive with the scope of the privilege against self-incrimination and did not afford immunity against disciplinary proceedings	2
CONCLUSION	6

TABLE OF AUTHORITIES

Cases:	
Boyd v. United States, 116 U.S. 616	5
Counselman v. Hitchcock, 142 U.S. 547	2
Garrity v. New Jersey, 385 U.S. 493	3
Matter of Klebanoff, 393 U.S. 840	4
Plymouth Sedan v. Pennsylvania, 380 U.S. 693	5
Spevack v. Klein, 385 U.S. 511	3
Ullmann v. United States, 350 U.S. 422	5
United States v. U. S. Coin & Currency, 401 U.S. 715	5
Wall, Ex Parte, 107 U.S. 265	2, 5
Zuckerman v. Greason, 386 U.S. 15, rehearing den., 386 U.S. 969	4
United States Constitution:	
Fifth Amendment	3, 6
Rules:	
United States Supreme Court Rules	
Revised Rule 8	5

IN THE

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—v.—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York (hereinafter referred to as "the Appellate Division"), made and entered on November 4, 1971, suspending petitioner from the practice of law in the State of New York for a period of eighteen months. On December 2, 1971, the Court of Appeals for the State of New York granted a motion to dismiss petitioner's appeal upon the ground that no sub-

stantial constitutional question is directly involved and denied petitioner's motion for leave to appeal, 29 NY2d 487, 875.

ARGUMENT

POINT

The Immunity Afforded Petitioner Was Co-extensive With the Scope of the Privilege Against Self-incrimination and Did Not Afford Immunity Against Disciplinary Proceedings.

Self-incriminating testimony may be compelled by a grant of immunity co-extensive with the scope of the privilege, *Counselman* v. *Hitchcock*, 142 U.S. 547. Since the privilege itself prohibits the use of compelled testimony only in a criminal case, and petitioner admittedly received immunity from criminal prosecution when he testified before the Grand Jury, it follows that the constitutional provision has been satisfied and that petitioner's testimony was not improperly compelled.

The license to practice law constitutes a certification to the public that the holder has been examined with respect to both character and learning and has been found to be reliable. When that certification and the holder's entitlement thereto is called into question, a disciplinary proceeding is the means by which the continued fitness of the holder is determined.

Consequently, since disciplinary proceedings are civil rather than criminal in nature, *Ex Parte Wall*, 107 U.S. 265, 288, the immunity conferred upon petitioner did not prohibit the filing of charges of misconduct predicated upon the subject matter of his testimony before the Grand Jury.

In an effort to overcome the clear wording of the constitutional provision, petitioner relies primarily on *Spevack* v. *Klein*, 385 U.S. 511, and other related cases and argues that they have expanded the term "in any criminal case" as used in the Fifth Amendment to include disciplinary proceedings. We respectfully submit that petitioner's reliance is misplaced and that nothing contained in any decision of this Court warrants such a conclusion.

The plurality opinion in *Spevack* indicates that the Court did not expand the scope of the privilege but rather found that the act of the State, disbarment, was an improper penalty imposed on an attorney for invoking his constitutional privilege not to incriminate himself "in any criminal case".

It follows, therefore, that this Court reversed the disbarment in *Spevack*, not because the attorney there involved had the right to refuse answers which might tend to subject him to discipline (such question being outside the scope of the privilege), but because disbarment was an improper penalty for the attorney's exercise of his constitutional right not to answer questions which might tend to incriminate him, he, unlike petitioner here, having no immunity from criminal prosecution.

The fact that this Court's decision in *Spevack* turned upon a finding of an improper sanction rather than expansion of the scope of the privilege against self-incrimination appears from the related case, decided the same day, of *Garrity* v. *New Jersey*, 385 U.S. 493. There the Court prohibited the use by the prosecution at a criminal trial of testimony compelled by threat of loss of job upon refusal to answer for any reason. This Court concluded that the

testimony elicited and sought to be used in support of criminal charges against the defendants, who, unlike petitioner here, did not have immunity from criminal prosecution, had been improperly compelled. Thus, this Court speaking through Mr. Justice Douglas, stated, 385 U.S. at p. 497:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."

It is evident that this Court did not expand the scope of the privilege but concerned itself with a determination of conduct by the State which constituted improper compulsion directed toward an individual to force him to waive his existing privilege against self-incrimination.

It should be noted, moreover, that the present case is factually as well as legally distinguishable from *Spevack* and the other cases cited by petitioner, *Zuckerman v. Greason*, 386 U.S. 15, rehearing denied, 386 U.S. 969, and *Matter of Klebanoff*, 393 U.S. 840, denying certiorari to 21 N.Y.2d 920. Petitioner here, unlike any of the attorneys in the cited cases, received immunity from criminal prosecution after first invoking his privilege against self-incrimination. In each of the cases cited by petitioner the attorney was faced with the still existing possibility that he might be subject to criminal prosecution for any crime disclosed if he answered, while petitioner had been granted complete immunity from such prosecution.

In addition, petitioner also asserts contentions predicated upon other decisions of this Court, principally *United*

States v. *U. S. Coin & Currency*, 401 U.S. 715, and *Boyd* v. *United States*, 116 U.S. 616. Petitioner's claims find no support in the opinions relied upon. *Boyd* and subsequent decisions of this Court which followed it, are distinguishable. As the Court noted in *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 701, the *Boyd* situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. In *United States* v. *U. S. Coin & Currency*, a similar determination was required since the forfeiture statutes, when viewed in their entirety, were intended to penalize only persons significantly involved in criminal enterprise. Accordingly, if the claimants there were compelled to give testimony, they would be asked to provide evidence to establish violations of what this Court concluded were essentially criminal statutes, i.e., to incriminate themselves.

In *Ullmann* v. *United States*, 350 U.S. 422 (1956), also cited by petitioner, the Court held that the immunity granted did not violate the Fifth Amendment because it provided against criminal prosecutions and, therefore, was sufficiently broad to displace the protection afforded by the privilege against self-incrimination.

This Court has continued to recognize the essential civil nature of disciplinary proceedings since the decision of *Ex Parte Wall*, *supra*, in 1882. Its rules concerning the discipline of attorneys admitted to its bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the

procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

In summary, it is respectfully submitted that petitioner's contention that the immunity he received from prosecution for any crimes revealed in his testimony before the Grand Jury also immunized him against any disciplinary proceeding is clearly without merit. Adoption of that proposition would mean, for example, that an attorney who had negotiated as an intermediary in the bribery of a public official and had been given immunity from prosecution for the crime in order that his testimony might be used in criminally prosecuting that public official, would thereafter not only be immune from prosecution for his own crime but would have to continue to be certified as an attorney in good standing by all the courts to which he was admitted and could even continue to practice before the very agency he had helped to corrupt. Such an astounding proposition finds no support in the Fifth Amendment or in any of the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U.S.
FILED
MAR 20 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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MYRON EPSTEIN,

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v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Respondent.

On Petition for a Writ of Certiorari to the Appellate Division, First Department, of the Supreme Court of The State of New York

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-994

MYRON EPSTEIN,

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v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Respondent.

On Petition for a Writ of Certiorari to the Appellate Division, First Department, of the Supreme Court of The State of New York

PETITIONER'S REPLY BRIEF.

Respondent's opposition rests primarily on the ground that disciplinary proceedings are civil in nature and that the Fifth Amendment privilege against self-incrimination is limited to criminal proceedings. This position disregards the very recent holding of this Court in *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971), upon which the

petition places principal reliance, following the landmark decision in *Boyd v. United States*, 116 U.S. 616 (1886), that the denomination of a proceeding as civil or criminal is not determinative of the applicability of the Fifth Amendment and that the privilege extends to civil forfeitures.[1]

Respondent does not suggest why forfeiture of the right to practice law for eighteen months is less penal in effect than the forfeiture of a sum of money, as in *U.S. Coin & Currency*, or property, as in *Boyd*, both of which have been held within the scope of the privilege because the sanction was criminal in effect although civil in name. The punishment of suspension from the bar is obviously more severe than forfeiture of money or property. Nor does the opposition respond to petitioner's demonstration that suspension from the practice of law and disqualification from other employment have been held to be criminal punishment for purposes of other constitutional provisions and that the Court should therefore decide whether the punishment of suspension from the practice of law should also be regarded as criminal punishment for purposes of the Fifth Amendment's privilege against self-incrimination.

Respondent opposes certiorari, however, because it would be an "astounding proposition" of law that would permit an attorney who, under threat of contempt, was compelled to provide evidence against himself warranting disciplinary action to continue in the practice of law. It should be noted, preliminarily, that petitioner was not disbarred as unfit to practice law; he was punished for his self-disclosed misconduct by an eighteen month suspension. But, more

[1] Petitioner does not argue that *Spevack v. Klein*, 385 U.S. 511 (1967), as respondent mistakenly asserts, has decided that disciplinary proceedings are within the scope of the privilege. That case, of course, held only that the privilege can be invoked in disciplinary proceedings and that the penalty of disbarment cannot be imposed for asserting the privilege. But whether the Fifth Amendment encompasses disciplinary action as punishment remains an important undecided constitutional question which should be resolved.

importantly, respondent overlooks the fundamental status of the Fifth Amendment privilege in our system of justice. It would obviously be more "astounding" to respondent to set free a person guilty of murder where his conviction was based upon his coerced, albeit entirely credible, confession. But it is the essence of the privilege "that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. * * * Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964). The Court quoted from "the great case of *Boyd v. United States*" the language that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime *or to forfeit his goods*, is within the condemnation" of the Fourth and Fifth Amendments. 378 U.S. at 8. (Emphasis supplied.)

Even before the Fifth Amendment was held applicable to State action in *Malloy v. Hogan*, coerced, self-incriminating testimony was held to violate the due process clause of the Fourteenth Amendment as offensive to "an underlying principle in the enforcement of our criminal law: that our is an accusatorial and not an inquisitorial system." *Rogers v. Richmond*, 365 U.S. 534, 541 (1961). As this Court stated in *Rochin v. California*, 342 U.S. 165, 173 (1952), "Coerced confessions offend the community's sense of fair play and decency." Under our system of justice, "society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillfull investigation." *Watts v. Indiana*, 338 U.S. 49, 54 (1949). With respect to respondent's "astonishment" at the proposition that offenders go unpunished if they are compelled to supply the evidence of their offense, the Court stated in *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960): "As im-

portant as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."

The offense to the community's sense of fair play and decency and the sacrifice of important human values are no less when the punishment of suspension is imposed upon an attorney out of whose own mouth the evidence of his transgressions was wrung.

Respectfully submitted,

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